A

DANNY ANTHONY ANDIPAI

v.

TAN SRI JOSEPH KURUP & ANOR (NO 2)

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[ELECTION PETITION NO: K26-02-2008]
8 SEPTEMBER 2008

C ***ELECTION:*** *Petition - Petition to set aside election - Rejection of petitioner's nomination papers on ground they were delivered late - Whether Returning Officer could overturn directive of Deputy Director of Election Commission to accept petitioner's nomination papers - Regulations of election - Whether to be treated as mere guidelines - Whether Deputy* D *Director functus officio - Whether election ought to be declared void - Requirements to be satisfied*

This was an application by the petitioner to have the election result for the Parliamentary seat of Pensiangan (P182) in Sabah E set aside. The basis of this application was premised on the contention that the petitioner's nomination papers were wrongly rejected by the 2nd respondent when he upheld an objection made during the objection period on nomination day. The 2nd respondent had refused to accept the petitioner's nomination F papers on the ground that the petitioner had delivered them late. During the discussion between the 2nd respondent and the petitioner, an Assistant Returning Officer sought advice from the Election Commission of Sabah ('EC'), which gave the directive to accept the nomination papers. Thus the 2nd respondent, pursuant to this directive from the Deputy Director of the EC, accepted the G papers but then put them up for objection. Under reg. 6(2) of the Elections (Conduct of Elections) Regulations 1981 ('Regulations') nomination papers must be delivered between 9am and 10am. The 2nd respondent subsequently announced that the 1st respondent was returned unopposed and declared him duly elected on the H ground that the petitioner's nomination papers were delivered later *ie*, after 10am. The main issue requiring determination was whether the Returning Officer could overturn the decision of the Deputy Director of the EC in respect of the acceptance of the nomination papers of the petitioner. I

Held (for the petitioner):

(1) The election regulations must be intended to "facilitate, not impede, the administration of a fair and an impartial election process". If only those who are able to submit their nomination papers before 10am are entitled to exercise their constitutional rights to contest in the election, it would lead to abuse and chaos – abuse in that one party can get a group of people to submit their nomination papers early to ensure that his or her opponent will not get to the Returning Officer before 10am, and chaos in that the intending candidate will be given licence to use force to get to the front of the queue to submit his or her nomination papers. This would be the consequence of the respondents' contention that the petitioner had a duty to ensure that he submitted his nomination papers before 10am. There was no doubt that the petitioner had that duty but there must be a corresponding duty on the part of the 2nd respondent or the EC to provide a fair and conducive process that would allow the petitioner and other candidates to submit their nomination papers on time and in an orderly manner. The only way to avoid such chaos and abuse is to treat reg. 6(2) and (2A)(a) of the Regulations as mere guidelines which ought to be followed but if the circumstances demand acceptance of nomination papers after 10am, the 2nd respondent or the EC can accept those papers. This was what the Deputy Director in her wisdom did and she could not be faulted for doing so. Her decision was what common sense demanded in the circumstances and, likewise, so is this court's interpretation of reg. 6(2) and (2A)(a) of the Regulations. Further, if one looked at s. 16 of the Elections Act 1958 ('Act'), the power of the EC overrode the regulations. Hence, in making the decision to accept the nomination papers, the Deputy Director was exercising a power provided for by law. For these reasons, the decision of the EC was not a decision contrary to the law. (paras 13, 14, 15, 16 & 18)

(2) The decision of the Deputy Director was one reached pursuant to an exercise of a quasi-judicial function. She had been properly briefed by an Assistant Returning Officer and she had taken into account all the relevant considerations before issuing the directive to accept the nomination papers on the ground that the petitioner was already in the

nomination centre. Prior to issuing the directive, she had adjudicated on an issue of dispute of whether the petitioner's nomination papers in law should be accepted. By her adjudication, she became '*functus officio*' and so were the EC and the 2nd respondent. It meant that her decision was final and could not be overruled by the 2nd respondent under the pretext that there was an objection during the objection period. The simple logic behind the doctrine of '*functus officio*' is to have some certainty and order in the administration of the government machinery. This sort of decision can only be overruled by a court of law. There was also merit in the submission that the petitioner had a legitimate expectation that the EC's decision would not be set aside by the 2nd respondent. Furthermore, the 2nd respondent was bound by law (s. 4(2A) of the Act) to enforce the EC's decision. Accordingly, the 2nd respondent's decision to uphold the objection made was wrong in law. Even if this court were wrong in reaching this decision, it did not help the respondents since the decision of the EC, in the circumstances of this case, was the correct one. A reasonable tribunal would have reached the same decision easily. (paras 19, 20, 21 & 26)

(3) For the election of the 1st respondent to be declared void, the requirements as laid down by the Federal Court in *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* must be satisfied: (a) there is non-compliance with the provision of the written law relating to the conduct of elections; and (b) that the non-compliance has affected the result of the election (s. 32(b) of the Election Offences Act 1954 ('1954 Act')). The wrongful rejection of the petitioner's nomination papers by the 2nd respondent had breached the petitioner's constitutional right to take part in the election and with it the written law relating to the conduct of the election. As for the 2nd requirement, the Federal Court had held that the phrase 'the result of the election' in s. 32(b) of the 1954 Act means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate. That interpretation could not be applied to the circumstances in this case as there was no contest at all to give 'any result'. In any event, it would be an exercise in guesswork and conjecture if the petitioner was required to

prove that if he had contested he would have won the election. Such an interpretation of the section would lead to absurdity. Hence, the second requirement should be ignored when there has not been a contest in the election. Since the two requirements in s. 32(b) of the 1954 Act had been complied with, the 1st respondent's election must be declared void and the 1st respondent was not duly returned as the winning candidate for the Parliamentary seat of Pensiangan (P182). (paras 37, 38 & 39)

Case(s) referred to:
Cutting v. Windsor [1924] 40 TLR 395 ***(refd)***
Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors [2005] 2 CLJ 237 FC ***(foll)***
Harjit Singh v. Umrao Singh AIR [1980] SC 701 ***(refd)***
United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 17
Elections Act 1958, ss. 4(2A), 5, 16
Elections (Conduct of Elections) Regulations 1981, reg. 4(8), 5(1), 6(2), (2A)(a), 7(1)(b), (2), (3), (4)
Election Offences Act 1954, s. 32(b)
Interpretation Acts 1948 and 1967, s. 17A

Municipal Corporations Act 1882 [UK], r. 7
Representation of the People Act 1951 [Ind], s. 33(1)

For the petitioner - Ansari Abdullah (Chau Chin Tang with him); M/s Ansari & Co
For the 1st respondent - Alex Decena (Wilson Lai, Marianti Robert, Lau Cheung Hoon with him); M/s Jayasuriya Kah & Co
For the 2nd respondent - Suzana Atan SFC (Chandradevi Letchumanan SFC & Amarjeet Singh Serjit Singh SFC with her)

Reported by Suresh Nathan

JUDGMENT

David Wong Dak Wah J:

Petition

[1] This is an application on the part of the petitioner to have the election result for the Parliamentary seat of Pensiangan (P182) in Sabah set aside. The basis of this application is premised on the contention that the petitioner's nomination papers were

wrongly rejected by the 2nd respondent when he upheld an objection made during the objection period on nomination day – 24 February 2008. That objection relates to the late delivery of the nomination papers of the petitioner.

Brief Facts

[2] The petitioner arrived at the Dewan Majlis Daerah Nabawan (nomination centre) on or about 9.35am to deliver his nomination papers for the Parliamentary Constituency of Pensiangan on nomination day for the 12th General Election. Prior to entering the nomination centre the Petitioner, his proposer and seconder had to register their personal details to the police on duty at the entrance. Upon entering the nomination center the petitioner proceeded to pay the appropriate deposit of RM15,000 in cash at the counter provided for payment and was then given a coupon bearing the number 10. When the petitioner attempted to submit his nomination papers, the 2nd respondent refused to accept them on the ground that the petitioner was late in delivering them. The petitioner naturally attempted to convince the 2nd respondent that it was not his fault and laid the blame on the 2nd respondent and his staff. Having failed to convince the 2nd respondent, the petitioner on the advice of his lawyers informed the 2nd respondent that he would be lodging a police report on the 2nd respondent's refusal. However during the discussion between the 2nd respondent and the petitioner, one of the Assistant Returning Officers, Osman Aganduk (ARO) sought advice from the State Election Commission which gave the directive to accept the nomination papers. This directive was relayed to the 2nd respondent who then accepted the nomination papers of the petitioner, Saineh Usau and Paul Gitang and then put them up for objection. This directive (Election Commission decision) came from the Deputy Director of the Election Commission of Sabah, one Puan Rafidah Datu Derin. (Deputy Director). The nomination papers of the petitioner were then endorsed with an acceptance time of 10.25am.

[3] During objection period, two objections were made against the petitioner's nomination papers. One related to the submission of nomination papers after 10am and the other related to a bankruptcy proceeding against him. As for Saineh Usau's nomination papers there was one objection which was also related to the late submission of his nomination papers. Under reg. 6(2)

of the Elections (Conduct of Elections) Regulations 1981 ('1981 Regulations') nomination papers must be delivered between 9am and 10am. After the objection period was closed at 11am and at about 1.25pm, the 2nd respondent announced that the 1st respondent was returned unopposed and declared him duly elected on the ground that the nomination papers of the petitioner and Saineh bin Usau were rejected on the ground that they were delivered after 10am.

Issues

[4] From the evidence adduced in this trial and the submissions made by counsels it is my view that this petition can be dealt with by deliberating on the following issues:

(1) Whether The 2nd Respondent Can Overturn The Election Commission Decision To Accept The Nomination Papers Of The Petitioner At 10.25am During The Objection Period?

[5] Part VIII of the Federal Constitution provides for the setting up of an independent body, namely the Election Commission, to oversee the election process of the country. This is embodied in s. 5 of the Elections Act which states as follows:

5. General powers and duties of Election Commission.

(1) The Election Commission shall:

(a) exercise control and supervision over the conduct of elections and the registration of electors on the electoral rolls, and shall enforce on the part of all election officers **fairness, impartiality and compliance with Part VIII of the Constitution** and this Act and any regulations made thereunder;

(b) have powers to issue to election officers such directions as may be deemed necessary by the Commission to ensure effective execution of Part VIII of the Constitution and this Act and any regulations made thereunder;

(c) have power to administer any oath required to be taken under this Act and any regulations made thereunder; and

(d) execute and perform all other powers and duties which are conferred or imposed upon it by this Act and any regulations made thereunder.

A (2) The Election Commission may delegate, subject to such conditions and restrictions as the Commission may consider necessary, any of the powers and duties conferred or imposed upon the Commission by this Act or any regulations made thereunder, to such person or officer as it may think fit:

B

Provided that -

(a) nothing in this subsection shall apply to any power to make regulations under this Act; and

C (b) no such delegation shall affect the exercise of such powers or the performance of such duties by the Commission.

[6] The powers of the Returning Officer, in this case the 2nd D respondent, are set out in s. 4 of the Elections Act which states as follow:

4. Powers of officers.

(1) A State Elections Officer shall, subject to the direction and E control of the Election Commission, have all the powers and may perform all the duties of the Commission in relation to the conduct of elections in the State for which he is appointed.

(2) A Deputy State Elections Officer shall, subject to the F direction and control of the State Elections Officer, have all the powers and perform all the duties of the State Elections Officer in the State for which he is appointed.

(2A) A returning officer shall, in common with other election officers, be G *subject to the control, supervision and direction of the Election Commission as provided in section (5) (1)(a) and (b). (emphasis added)*

(3) An assistant returning officer shall, subject to the direction and control of the returning officer whom he is appointed to H assist, have all the powers and may perform all the duties of the returning officer.

(4) (a) If any returning officer is by sickness or other cause prevented or disabled from performing any of his duties under this Act and there is no time for any other person to I be appointed by the Election Commission the returning officer may appoint an assistant returning officer to act for him.

(b) Every appointment under paragraph (a) shall as soon as possible be reported to the Election Commission and may be revoked by the Commission but without prejudice to the validity of anything already done by any assistant returning officer so appointed.

(5) An enforcement officer shall, subject to the direction and control of the State Elections Officer, have all the powers of and perform all the duties given to him for the enforcement of laws relating to the conduct of elections in the constituency for which he is appointed.

[7] From the reading of the two provisions, it is clear that Returning Officers like the 2nd respondent are subject to the control, direction and supervision of the Election Commission.

[8] As stated earlier in my judgment, the initial rejection by the 2nd respondent of the petitioner's nomination papers was grounded on the fact that they were delivered after 10am. It is clear from the evidence that the petitioner had made an unsuccessful appeal to the 2nd respondent. However the 2nd respondent recanted and accepted the nomination papers of the petitioner after being informed of the Election Commission decision to accept the nomination papers of the petitioner, Saineh Usau and Paul Gitang on the ground that they were inside the nomination center before 10am. (see D3).

[9] The respondents now challenge the Election Commission decision on the ground that it was made contrary to law and should be treated by this court as void ab initio. Their contention is premised on reg. 6(2) and 6(2A)(a) of the 1981 Regulations which respectively state as follows:

6(2) The nomination papers in triplicate must be delivered to the returning officer -

(a) at the place of nomination; and

(b) between the hours of nine o'clock and ten o'clock in the forenoon on the day of nomination, by the candidate and his proposer and seconder or by any two or by any one of them.

A and

6(2A) The Returning Officer shall not accept the nomination papers of any candidate -

(a) which are not delivered within the period specified in
B paragraph (2)(b) ...

[10] In their views the just mentioned regulations must be strictly complied with by the 2nd respondent and any attempt to deviate from it by anyone should be treated by the court as an unlawful
C act. In other words the Election Commission had no such power to issue such directive. Furthermore, it is submitted that there is no statutory duty on the part of the 2nd respondent to ensure that the nomination papers of the petitioner were delivered within the prescribed time. In fact they submit that the petitioner himself
D has a statutory duty to deliver his nomination papers within the prescribed time and failure on his part would result in the rejection of the nomination papers.

[11] It is trite law that the basic rule of construction is that every
E statute must be read as a whole, with its words given their ordinary and natural meaning unless doing so would produce an absurdity. There is of course another rule of construction and that is the purposive approach as stipulated in s. 17A of the Interpretation Act which reads as follows:

F In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

G **[12]** Two points need to be made from the outset and they are these:

(1) The basic and primary purpose of any election law in a democracy is to ensure elections in the country are always
H carried out fairly and impartially. This ideal is in fact embodied in s. 5 of the Elections Act 1958 which provides that the Election Commission shall ensure that all election officers shall act with fairness, impartiality and in compliance with Part VIII of the Constitution in the conduct of all elections.

I This is also reflected in what is stated in the Apex Court of the land in *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* [2005] 2 CLJ 237:

> We do agree with the submission of learned counsel for the appellant that due emphasis should be given to the overriding principles of democracy and the need to protect the purity of the election process …

(2) The provisions which I am asked to construe are regulations made pursuant to powers given to the Election Commission under the Elections Act. These regulations in my view are akin to the High Court Rules which are made pursuant to s. 17 of the Courts of Judicature Act 1964. In recent times the courts have taken a less stringent view in interpreting the rules. This can be seen from the often quoted case of *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 where Ahmad Fairuz JCA (as he then was) said:

> Our Federal Court in the case of *Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p. 189 said:
>
> > The Rules of the Supreme Court **are intended to facilitate, not impede, the administration of civil justice.**
> >
> > In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
> >
> > But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
> >
> > This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear* [1907] 1 KB 1:
> >
> > > Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case. (emphasis added.)

A And in the same case, Ali FJ, said (at p. 192):

> The general principle, I think, is that rights of parties in an action are not to be defeated by technical objections.

B In this connection, we would also like to quote what this court had said in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at p 293, ie:

C > … After all, courts exist to do justice according to the law as applied **to the substantial merits of a particular case** … (emphasis added.)

Kaikaus J, in *Imtiaz Ahmad v. Ghulam Ali* PLD [1963] SC 382 at p. 400 said:

D > **Any system which** by giving effect to the form and not to the substance defeats **substantive rights is defective to that extent.** The ideal must always be a system that gives to every person what is his. (emphasis added.)

E Bearing in mind the abovementioned authorities, I feel that the preliminary objection should not be allowed. The objection is indeed on a mere technicality.

[13] Likewise the election regulations must be intended to F "facilitate, not impede, the administration of a fair and an impartial election process".

[14] Coming back to the issue at hand and that is whether reg. 6(2) and 6(2A)(a) of the 1981 Regulations prohibit the 2nd G respondent or the Election Commission to allow receipt of nomination papers after 10am on nomination day. If I were to adopt the position of the respondents, it may lead to a chaotic situation. Take the situation at the nomination center in this case. The nomination center was used to cater for two state H constituencies and a parliamentary constituency where only one counter was open for all the candidates for the three constituencies to submit their nomination papers. There were 12 citizens of the land who wanted to be candidates in the 12th general election turning up to deliver their papers on nomination I day and that number had in fact caused some confusion and dispute resulting in this election petition. What if 20 citizens turned up on that nomination day? Are we to say only those who are

able to submit their nomination papers before 10am are entitled to exercise their constitutional rights to contest in the election? If that is the law, it will lead to abuse and chaos. Abuse in that one party can get a group of people to submit their nomination papers early to ensure that his or her opponent will not get to the Returning Officer before 10am. Chaos in that intending candidate will be given a license to use force to get to the front of the queue to submit their nomination papers. This, with respect, will be the consequence of the respondents' contention that the petitioner had a duty to ensure that he submitted his nomination papers before 10am. I have no doubt the petitioner has that duty but there must be a corresponding duty on the part of the 2nd respondent or the Election Commission to provide a process which is fair and conducive to allow the petitioner and other candidates to submit their nomination papers on time and in an orderly manner. In fact the Election Commission had seen fit to issue in the following guideline in exh. F para 7.4 which states:

> Peringatan:
>
> Pegawai Pengurus hendaklah meminta calon atau mereka yang hadir untuk menyerah borang-borang berkenaan supaya segera mengemukakan kertas pencalonan sebaik masuk ke bilik penamaan calon.

English translation:

> Reminder:
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> The Returning Officer should request the candidate or those present to submit the relevant forms to forward the nomination papers immediately upon entering the nomination room.

[15] The evidence does not show that this guideline was not complied with by the 2nd respondent. In my view the only way to avoid such chaos and abuse is to treat reg. 6(2) and 6(2A)(a) of the 1981 Regulations as mere guidelines which ought to be followed but if the circumstance demands acceptance of nomination papers after 10am, the 2nd respondent or the Election Commission can accept those nomination papers. This was what the Deputy Director of the Election Commission in her wisdom did in this case and in my view she cannot be faulted. Her decision was what common sense demanded in the circumstances and likewise so is my interpretation of reg. 6(2) and 6(2A)(a) of

A the 1981 Regulations. Further if one looks at s. 16 of the Elections Act, the power of the Election Commission overrides the regulations. It provides as follows:

> **16. Power to make regulations relating to the conduct of elections.**
>
> B (1) The Election Commission may with the approval of the Yang di-Pertuan Agong make regulations for the conduct of elections to the Dewan Rakyat and the Legislative Assemblies, and for all matters incidental thereto.
>
> C (2) **Without prejudice to the generality of the foregoing powers** the regulations may -
>
> (a) prescribe the manner in which notice of the holding of an election shall be given;
>
> D (b) prescribe the procedure for the nomination of candidates and for the making of and decision on, objections to any nomination;
>
> (bb) provide for the procedure in the granting of approval by the Election Commission of any symbol to be used in any election:
>
> E Provided that the Election Commission shall not approve any symbol connected with any religion or sect thereof or which is otherwise incompatible with good order or morality;

[16] Hence in making the decision to accept the nomination F papers of the Petitioner, Saineh Usau and Paul Gitang, the Deputy Director was exercising a power provided for by law.

[17] It is not insignificant that under reg. 4(8) of the 1981 Regulations, the Returning Officer is required to supply a set of G nomination papers and statutory declaration to any person or political party applying for the papers before 10am on the day of the nomination. It is also not insignificant that under reg. 5(1) of the 1981 Regulations that the candidate may deposit the sum of RM10,000 in legal tender with the Returning Officer at any time between the notice of election until 10am on nomination day. H These two regulations reconfirm my view that the regulations exist to "facilitate, not impede, the administration of a fair and an impartial election process".

[18] For reasons stated above, I hold that the Election I Commission decision was not a decision contrary to law.

[19] This brings me to next issue and that is whether the 2nd respondent was correct in law to in effect overturn the Election Commission decision when he upheld the objection to the nomination papers of the petitioner. To answer that issue the starting point would be to determine whether the Deputy Director on behalf of the Election Commission was exercising a 'quasi judicial function' when she gave the directive to accept the nomination papers of the petitioner, Saineh Usau and Paul Gitang. 'Quasi judicial' is defined in *Black's Law Dictionary* 5th edn as 'a term applied to the action, discretion, etc, of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearing, and draw conclusion from them, as a basis of their official action, and to exercise discretion of a judicial nature'. Applying that definition to the facts here, I have no hesitation in finding that the decision of the Deputy Director was one reached pursuant to an exercise of a quasi judicial function. It is unfortunate that the ARO and the Deputy Director were not called to give evidence despite the fact that I was informed by one of the SFCs that they would be. I am mindful of the law that the 2nd respondent is not obliged to call the two persons. However there is merit in the submission of Encik Ansari Abdullah, lead counsel for the petitioner, that the 2nd respondent represents the Election Commission which in turn represents the electorate at large and it is incumbent on them to ensure that all the relevant evidence is before the court as it has a constitutional duty to ensure the election was carried out in a fair and impartial manner. Be that as it may, their absence in my view confirms (as there is no evidence to the contrary) that the Deputy Director had been properly briefed by the ARO and she had taken into account all the relevant considerations before issuing the directive to accept the nomination papers on the ground that the petitioner was already in the nomination center. Prior to issuing the directive, she had adjudicated on an issue of dispute of whether the nomination papers of the petitioner in law should be accepted. By her adjudication, she became *'functus officio'* and so were the Election Commission and the 2nd respondent. In plain English it means that her decision was final and cannot be overruled by the 2nd respondent under the pretext that there was an objection during the objection period. The simple logic behind the doctrine of *'functus officio'* is to have some certainty and order in the administration of the government machinery. This sort of decision can only be overruled by a court of law.

[20] Though not necessary for me to decide whether the principle of legitimate expectation applies to election law, I am of the view that there is merit in the submission that the petitioner has a legitimate expectation that the Election Commission Decision will not be set aside by the 2nd respondent. The principle of legitimate expectation derives from the realm of equity and fairness and I cannot think of any valid reason why this principle of equity and fairness should not apply in the circumstances of this case.

[21] Furthermore and finally, the 2nd respondent was bound by law (s. 4(2A) of the Elections Act) to enforce the Election Commission decision.

[22] Mr. Amarjeet Singh a/l Serjit Singh (Mr. Singh) however submits to the contrary and refers to reg. 7(1)(b) of the 1981 Regulations which reads as follows:

> 7. Objection to nomination papers
>
> (1) Objection may be made to a nomination paper by any person whose name appears in the electoral rolls for the constituency and by any candidate for the constituency on all or **any of the following grounds** but no other ground, namely -
>
> (a) …
>
> (b) that the nomination paper does not comply with or **was not delivered** in accordance with these Regulations:
>
> Provided that no objection shall be made under this subparagraph in respect of any matter which, by virtue of regulation 4(6A), does not render a nomination paper liable to be rejected:
>
> (c) … (emphasis added)

[23] He places heavy emphasis on the words "not delivered" in reg. 7(1)(b) and submits that the 2nd respondent was correct and empowered to entertain the objection of late submission of the nomination papers by the petitioner. I would agree with Mr Singh if the Deputy Director had not made a decision on the issue of late delivery. As I said earlier, when the Deputy Director made the decision after the appeal by the petitioner to accept his nomination papers, that decision became final as far as the Election Commission and the 2nd respondent are concerned.

[24] As for the interpretation of the words 'not delivered' in reg. 7(1)(b), they are to be interpreted to refer to objection to nomination papers being delivered where there had not been a decision on a dispute as to whether they should be accepted or not as in this case. An example of this would be a Returning Officer mechanically accepting the nomination papers of a candidate who had only entered into the nomination center after 10am.

[25] Accordingly I find that the 2nd respondent's decision to uphold the objection made was wrong in law. I am also perplexed by the stand of the counsels for the 2nd respondent in attacking the Election Commission decision and defending the decision of the 2nd respondent to reject the candidacy of the petitioner in the face of s. 4(2A) of the Elections Act which provides that the 2nd respondent is subject to the directives of the Election Commission. They have done this attack without calling the Deputy Director and the ARO to explain the decision. They have also ignored the fact that the 2nd respondent and the Election Commission are the sum of one and indivisible.

[26] Even if I am wrong in the above decision, it does not help the respondents as I am of the view that the Election Commission decision was the correct one in the circumstance of this case which is this. The petitioner, Saineh Usau and Paul Gitang were inside the nomination center well before 10am. The 2nd respondent only called the candidates to come forward to submit their nomination papers at 9.40am and between 9.40am to 10am he had to deal with nine candidates bearing in mind that the 2nd respondent had prior to 9.40am only entertained only three candidates. On the day of nomination only one counter was open for three constituencies. All candidates had paid their deposits for the election well before 10am. The handing out of coupons with numbers after the payment of the deposits had given the impression that candidates were required to be called for submission of nomination papers. In short, the Election Commission through the Deputy Director found that it was only appropriate that the nomination papers of the petitioner, Saineh Usau and Paul Gitang be accepted to ensure the election was held in fair and impartial manner. I cannot fault her decision as it was a decision which a reasonable tribunal would have reached easily.

[27] As for the decision of the 2nd respondent to uphold the objection made, it was a wrong decision and my reasons are these. Apart from the circumstance which I have set out in the previous paragraph, I find certain aspects of the 2nd respondent's conduct troubling and when taken in its totality, I can only conclude that the decision made was definitely not one which a reasonable tribunal would come to. What are these aspects?

(1) I find it unbelievable that the 2nd respondent did not know as he alleged that coupons bearing numbers were given to the candidates on that day. If what he says is true, this only reflects his own shortcomings as the Returning Officer who had full charge of the nomination center. As stated earlier, the use of the coupons with numbers must have given an impression to the candidates that they will be called by their numbers before they are allowed to submit their nomination papers. On this aspect I have no reason to doubt the testimony of PW9 (Joseph Gantoh) when he said he was prevented by one of the Assistant Returning Officers when he attempted to submit his nomination papers. In fact this testimony was never rebutted. Hence one cannot fault the Petitioner for waiting to be called.

(2) There was no explanation by the 2nd respondent why the nomination papers of the Suadin @ Shuhaiddin bin Langkab @ Langab (PW3) was endorsed with a time of 9.57am when in fact it was only accepted after the successful appeal by his lawyer (PW7) who only came into the nomination center at about 10.50am.

(3) There was no evidence from the 2nd respondent that PW3's nomination papers were being held up by the dispute concerning the use of the 'Parti Setia' symbol. This was part of the case put forth by the respondents during the petitioner's case but unfortunately the 2nd respondent was not asked about this allegation. The consequence is simple and that is it was never the case for the respondents that PW3's nomination papers were held up because of the dispute over the use of the 'Parti Setia' symbol.

(4) There was no explanation by the 2nd respondent why the objection time only started at around 10.54am. This has cut short the objection time from 60 minutes to a mere 6 minutes causing one witness to call the situation as 'Kelam-Kabut'. The

2nd respondent could have sought the Election Commission's advice on this matter. Why he did not do so in my view raises doubt on the propriety of the election process on that day.

(5) There was again no explanation why the 2nd respondent did not seek advice from the Election Commission when it is specifically provided in the 'Buku Panduan Pegawai Pengurus' that he as the Returning Officer should seek advice in dealing with objections. Not only that, he also failed to inform the petitioner, proposer or seconder of his decision and grounds 'with the least possible delay' as required by reg. 7(4) of the 1981 Regulations.

(6) The 2nd respondent's assertion that he accepted the nomination papers of the petitioner subject to any objection during objection time is to me an afterthought. He never told the petitioner about that qualification. Nor was it written in the nomination papers. In any event the law does not allow him to do so. It appears to me from the evidence of the 2nd respondent that he was not happy with the Election Commission decision to overturn his decision to reject the nomination papers of the petitioner and then when given a chance to resuscitate his decision he did so without giving it a thought least of all referring to the Election Commission for advice.

[28] To complete this part of my judgment, let me say that the case of *Cutting v. Windsor* [1924] 40 TLR 395 cited by Mr Alex Decena (Mr Decena), counsel for the 1st respondent is distinguishable to the case at hand. In that case, r. 7 of the Rules in Part II of the Third Schedule of the Municipal Corporations Act, 1882 [a U.K. legislation] provided:

> Every nomination paper … must be delivered by the candidate … Seven days at least before the day of election, and before 5 o'clock in the afternoon of the last day for delivery of nomination papers.

[29] In the present case, the period given is a mere one hour while in the English case candidates are given seven days to deliver their nomination papers. This difference makes reliance on that authority inappropriate.

[30] As for the Indian case of *Harjit Singh v. Umrao Singh* AIR [1980] SC 701 in relation to s. 33(1) of the Representation of the People Act 1951 of India, which similarly provided for a specified period of the day, ie, between eleven o'clock in the forenoon and three o'clock in the afternoon, for nomination papers are to be delivered, I am also of the view that the facts here and in that case are different and hence not applicable to this case. The salient fact in that case is that the learned judge had found as a fact and upheld by the court of appeal that the appellant had been late in filing his nomination papers by 10 minutes and no valid reason was given. In the present case the 2nd respondent had to deal with nine candidates within a span of 20 minutes. In any event, I cannot find a similar provision as s. 16 of the Elections Act in the two cited cases.

(2) Whether The Objections Allegedly Made By Datuk Ellron Angin (RW1) Were Valid In Law In View Of Their Non Compliance With s. 7(3) Of The Elections (Conduct Of Elections) Regulations 1981?

[31] Though it is not necessary for me to deal with this issue in view of my decision on issue 1, I feel that out of respect to the learned counsels' lengthy submissions on this issue, I should do so.

[32] For the purpose of dealing with this issue it is appropriate that I scan and display the relevant objection papers, ie, exh. D3, D4, D7 and D16 in my judgment which I now do.

A

B

EKOD BANTAHAN PENAMAAN CALON DAN KEPUTUSAN PEGAWAI PENGURUS TERHADAP BANTAHAN

Bagi Dewan Rakyat bagi Negeri ~~N. 37 Sooto~~

Pilihan Raya Parlimen P. 182 Pensiangan

C

Calon yang dibantah Danny Anthony Andipai

Orang yang membuat bantahan Elvon Angin

Penyenaraian orang yang membuat bantahan 590715-12-5599

Terkandung dalam Daftar Pemilih 664 182/37/11 Ansip

D

Sebab-sebab bantahan:

Kerana pengerahan barang
kempen calonan di buat selepas
masa yang menerimaan
ditetapkan iaitu jam 9 pagi
hingga 10 pagi. Barang
di serah pada jam 10.25 pagi

E

F

Kerana tidak lengkapi SPR dan
kita tidak berkuasa untuk menerima
barang pencalonan selepas masa
ditetapkan. Calon mengikut jam 10.00 tepat
Calon mengikut jam 10.25 pagi

G

Bertarikh pada 20

H

Tandatangan Pegawai Pengurus
Pegawai Pengurus
Bahagian Pilihan Raya P. 182 Pensiangan

Bantahan yang telah siap hendaklah dihantar kepada Pengarah Pilihan Raya Negeri.

I

A

B

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D

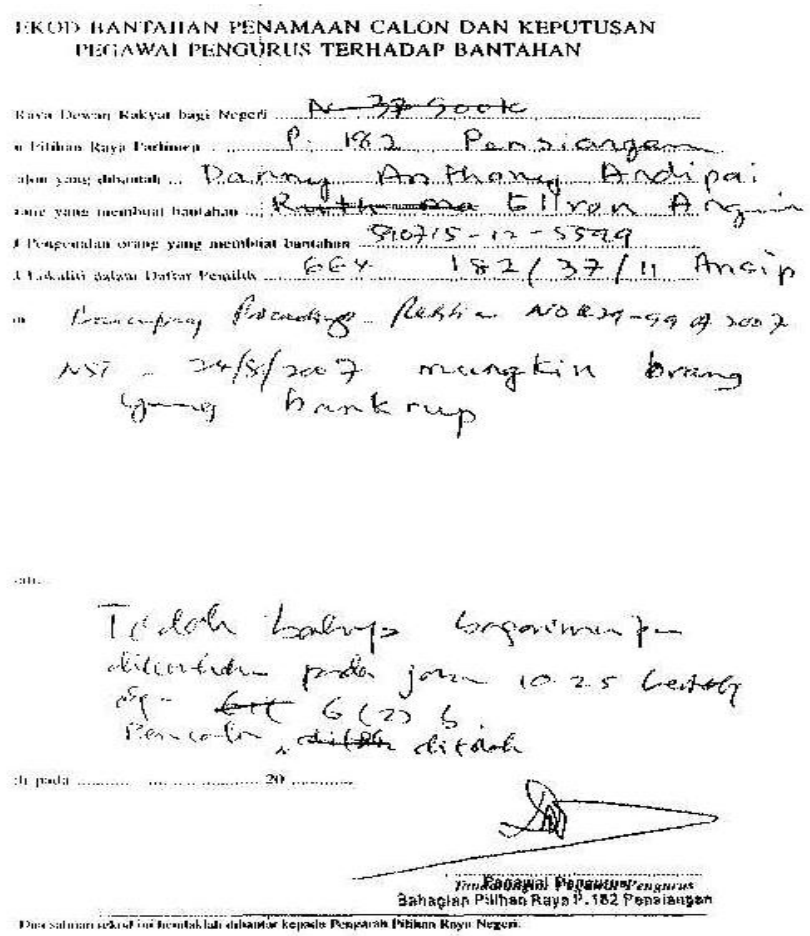
E

F

G

H

I



BORANG BANTAHAN PENAMAAN CALON DAN KEPUTUSAN PEGAWAI PENGURUS TERHADAP BANTAHAN

Bagi Dewan Rakyat bagi Negeri P. 39 Sook

Kawasan Pilihan Raya Parlimen P. 182 Penampang

Nama yang dibantah ... Danny Anthony Andipai

Nama yang membuat bantahan ... Ruth Ellen Angin

No. Pengenalan orang yang membuat bantahan 810715-12-5529

No. Lokaliti dalam Daftar Pemilih 664 182/37/11 Ancip

Sebab Bankruptcy Proceedings Rekod No 29-99 of 2002 NST - 24/8/2007 mungkin orang yang bankrup

Nama ...

Tidak hadir tarikh penamaan dilantik pada jam 10.25 Letak Sy. Fail 6(2) b Pencalon dilantik ditarik

Ditandatangani pada ..... 20 .....

Tandatangan Pegawai Pengurus
Bahagian Pilihan Raya P. 182 Penampang

Dua salinan borang ini hendaklah dihantar kepada Pengarah Pilihan Raya Negeri.

A

B

EKOD BANTAHAN PENAMAAN CALON DAN KEPUTUSAN
PEGAWAI PENGURUS TERHADAP BANTAHAN

Raya Dewan Rakyat bagi Negeri .....
n Pilihan Raya Parlimen ..... 182 - Machang
alon yang dibantah ..... SAINEH BIN USAH
ang yang membuat bantahan ..... Ellan Anjin
Pengenalan orang yang membuat bantahan 590915-11-5579
Tempat dalam Daftar Pemilih ..... 181/37/11 Ampp / 6668

C

D

Late submission i.e. be submitted at 10:30 a.m.
instead of 9 am to 10 am

E

F

Kami telah bagi SPA dan
dalam tempoh untuk menerima
bagaimana pun diterima selepas jam 10.30
pagi diterima dan pencabar ditolak berdas
2477/08 seksyen 6(2) b, pindaan tahun 1994

G

Pegawai Pengurus
Bahagian Pilihan Raya P.192 Pensiangan
Tandatangan Pegawai Pengurus

Dan salinan rekod ini hendaklah dihantar kepada Pengurusan Pilihan Raya Negeri.

H

I

A

BANTAHAN TERHADAP KERTAS PENAMAAN CALON

B

...aya Dewan Rakyat bagi Negeri ... P 182 Penampang.
...Dihalan Raya Parlimen ... P. 182. Penampang
...an Pembantah: Joseph Kurup. Danny Anthony Andipai
Nama ...
No. Kad Pengenalan ... 670418-12-5703
No. Kod Lokaliti dalam Daftar Pemilih ... Dalam Negeri

C

...alan dibuat ke atas Kertas Penamaan:
Nama Calon ... Joseph Kurup.
No. Kad Pengenalan Calon ...
...sebab bantahan:
Kurang pihak atau : Tiada.

D

...an bantahan:
...ah menyamar Pegawai SLDB.
Nama bukti perlu dalam Jawatan.

...pada 24/02 20 08

E

Tandatangan Pembantah

...KE

F

G

Keputusan

H

Surat Cukup pada fail jawab
a/b. diterima
b/b. difail

I

24/2/08

[33] Before I deal with counsels' contentions, I should set out regs. 7(2)(3) and (4) of the 1981 Regulations:

> 7(2) No objection to a nomination papers shall be allowed unless it is made to the returning officer between 10 o'clock and eleven o'clock in the forenoon on the day of nomination.
>
> (3) Every objection shall be in writing signed by the objector and shall specify the grounds of objection. The returning officer may himself lodge an objection on any of the grounds set out in paragraph (1).
>
> (4) The returning officer shall with the least possible delay after eleven o'clock in the forenoon on the day of nomination decide on the validity of every objection and inform the candidate concerned or his proposer or seconder named in the nomination paper provided for in paragraph (3) of regulation 4 or the objector mentioned in paragraph (1) of regulation 7 of his decision and ground thereof. Such decision and grounds thereof shall be kept on record.

[34] From the scanned exhibits one can easily see the following glaring features:

1. Wrong forms (form 713) were used for the objections (see D3, D4 and D7). The right form provided by the Election Commission was form 713A. (see D16);
2. The alleged objector did not sign on the objection forms;
3. There were several authors to the objection forms and
4. There was no written record as to when the objections were received by the 2nd respondent.

[35] Mr. Singh, counsel for the 2nd respondent, urges the court to treat the above non compliance of reg. 7(3) of the 1981 Regulations as mere irregularities and should not be treated as fatal. From the exhibits, he submits that there was no dispute as to the identity of the objector, namely Datuk Ellon bin Angin, as his particulars were written on the objection forms and he was known to the 2nd respondent, making the absence of his signature insignificant. I have no problem with Mr. Singh's submission if the only omission was the absence of the signature on the objection papers. However that is not the case here. In fact there are so many unsatisfactory features on exhs. D3, D4 and D7 that if I

were to ignore them it would mean that people making any objection can completely disregard the regulation. What are these unsatisfactory features?

(1) Who was actually the objector?

RW1 in his testimony admitted that he did not sign D3 and D4 and further that he was not the sole author of the D3 and D4. Counsel for the 1st respondent, Mr Decena in cross examination of Engah bin Sintan (PW6) put the 1st respondent's case as Ruth Marcus (RW4) making the two objections orally and in written form. To compound the confusion, in his opening statement, Mr. Decena stated that it was the 1st respondent who made the objection on the nomination papers of the petitioner. RW4 also in her testimony said she was one of the authors to D3 and D4. Whatever liberal construction is given to reg. 7(3) of the 1981 Regulations, the identity of the objector must be established. Here sadly it has not been satisfactorily established.

(2) The 2nd respondent never informed the petitioner, proposer or seconder of his decision and grounds as required by reg. 7(4) of the 1981 Regulations. No explanation was given by the 2nd respondent.

(3) There wasn't any satisfactory explanation by the 2nd respondent why he did not refer the objection made to the Election Commission as required of him by para 17 of exh. F – Buku Panduan Pegawai Pengurus. The requirement is quite specific as can be seen here:

17. Meminta Nasihat Daripada Suruhanjaya Pilihan Raya

17.1 Semasa menimbangkan untuk menerima sesuatu bantahan, PP hendaklah meminta pandangan PPN. PPN perlu merujuk kepada SPR melalui Setiausaha SPR bagi mendapatkan nasihat dari Pengerusi SPR sebelum sesuatu keputusan dibuat.

Peringatan:

Nasihat yang diberikan oleh PPN atau SPR hendaklah dipatuhi.

The English translation reads as follow:

17. Seeking Advice From Election Commission

17.1 While deciding to receive any objection, the RO should seek PPN's view. PPN need to refer to EC through Secretary to EC to get the advice of Chairman, EC before any decision is made.

Reminder:

Advice given by PPN or EC should be obeyed/followed.

(4) There was no endorsement of the time of receipt of the objections made bearing in mind that there is a prescribed time period in which complaints can be made. Common sense dictates that such an endorsement should have been made to avoid any dispute. I am fully aware of the testimony of the 2nd respondent and witnesses called by the 1st respondent that the objections were made prior to 11am. However this is disputed by the petitioner and it is then incumbent on the court to make a finding of fact. Every witness for the 1st respondent testified that the lawyers were allowed into the nomination center at 10.40am. This is contrary to the evidence of PW7 who said he was allowed to enter the nomination center around 10.50am and the evidence in P1 which states that the time of entry for lawyers was 10.54am. The author of P1, who is the police officer keeping the record at the entrance of the nomination center (RW7) never said in court that that entry was wrongly made which makes his evidence part of the 2nd respondent's case. In determining which version is more credible I take into account whether the witnesses are independent or not. The witnesses for the 1st respondent cannot be treated as independent. RW1 was a candidate for the Barisan Nasional front, a party which the 1st respondent belongs to. Paul Yambak (RW2) was the proposer to the candidacy to the 1st respondent. Kunin @ Abdul Kunin bin Saili (RW3) was the seconder to the candidacy to the 1st respondent. RW4 is the cousin and was the legal adviser of the 1st respondent on nomination day. Damianus Bianus Aludah (RW5) was the legal adviser for RW1. However as to PW7 and RW7 I find them to be independent witnesses as there is no evidence before me which shows that they have any motive to side with the

petitioner or both respondents. Furthermore it is noteworthy that all the witnesses for the 1st respondent testified in court to the exact time of '10.40am' as the time of entry for lawyers. The inference to make is obvious. Hence I agree with Encik Ansari that the objection time allowed was only a mere 6 minutes. Bearing in mind that PW7 had successfully appealed to the 2nd respondent in respect of PW3's nomination papers, it may not have been possible to have received and dealt with the objections to the petitioner's nomination papers prior to 11am.

(5) I am amazed by the fact that the petitioner was able to use the correct objection form – 713A (D16) to lodge his objection against the 1st respondent while the 1st respondent's agents did not do so. Let me say here that the use of wrong form may not be fatal but it points irresistibly to the conclusion that there was a mad dash among the lawyers to lodge their objection. In fact the evidence of RW5 is that he was practically running into the nomination center. Another witness said that the situation during the objection period was 'kelam- kabut'.

(6) The 2nd respondent himself had to explain in court what were written in D3 and D4. His testimony is that he treated the 2 objections by RW1 as one and hence only wrote his decision on D4. That may very well be the case but the fact that he did not tell the petitioner of his decision and ground as required by law prior to his announcement that the 1st respondent was returned as unopposed makes his explanation subject to suspicion bearing in mind that the aforesaid announcement was made at 1.25pm some two and a half hours after the close of objection. Furthermore such important documents must be understood by themselves without the need of any explanation by the 2nd respondent. At the point of repetition, the 2nd respondent on behalf of the Election Commission has a constitutional duty to ensure the election was carried out in fair and impartial manner which means like justice must be seen to be done, so also the process of election must seen to be to fair and impartial.

[36] So after taking into consideration of the totality of the evidence before me it is my finding that the objections to the petitioner's nomination papers should be and are treated by me as invalid.

Conclusion

[37] For me to declare the election of the 1st respondent void, I must be satisfied with the requirements as laid down by the Federal Court in *Dato' Ismail Kamus v. Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors* [2005] 2 CLJ 237 at p 245:

(a) there is non-compliance with the provisions of the written law relating to the conduct of elections; and

(b) that the non-compliance has affected the result of the elections. (s. 32(b) of the Election Offences Act 1954)

[38] In the petition, the petitioner alleged that the 2nd respondent had breached the principles laid down under the Elections Act 1958 and the Elections (Conduct of Elections) Regulations 1981. In my view the wrongful rejection of the nomination papers of the petitioner by the 2nd respondent had breached the petitioner's constitutional right to part take in the election and with it the written law relating to the conduct of election. As for the 2nd requirement, the Federal Court had held that the phrase 'the result of the election' in s. 32(b) of the Election Offences Act 1954 means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate. That interpretation cannot be applied to the circumstance which we have here as there was no contest at all to give 'any result'. In any event it would be an exercise in guess work and conjecture if the petitioner is required to prove that if he had contested he would have won the election. Such an interpretation of the section would lead to absurdity. Hence I am of the view that the second requirement should be ignored when there has not been a contest in the election.

[39] Since I have found that the two requirements in s. 32(b) of the Election Offences Act 1954 to have been complied with, the election of the 1st respondent must be declared void which I now do declare and I also declare that the 1st respondent is not duly returned as the winning candidate for the Parliamentary seat of Pensiangan – P182. I also award costs to the petitioner.